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DIGITISATION, CULTURAL INSTITUTIONS AND INTELLECTUAL PROPERTY[1]

by

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Digitisation of cultural content represents one of most challenging problems of contemporary IP law. Cultural artefacts, let it be books, paintings or 3D objects, are often very old, so there are no issues in copyright protection of their content. However, the public availability of such content is in these cases strongly limited namely due to physical conditions of the carriers and subsequent conservation demands.

Digitisation might serve here as powerful enabler of re-use of these works that are frequently of enormous cultural value. On the other hand, getting useful (and re-usable) digital images of 2D or 3D cultural objects means to invest into advanced technologies that are able to capture the respective content while protecting its fragile carriers from physical damage or destruction. Consequently, there is a need for business models that can motivate investors by offering them valuable consideration for such efforts.

Recently, such business models are based namely on exclusive agreements between digitisers and cultural institutions that, together with specific copyright protection of digitised images in some jurisdictions, create new form of legal barriers to re-use of even very old cultural content. The paper critically discusses these new restrictive legal instruments namely in the light of the revised PSI re-use directive.

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1. INTRODUCTION

1.1 INTELLECTUAL PROPERTY AND PSI RE-USE

Intellectual property philosophically aims to promote useful creative and/or inventive activities. Instruments of intellectual property law are in that sense used namely to protect the results of creative and/or inventive work.[2]

The concept of intellectual property is philosophically based on grounds that originate in the end of 19th century and are founded on similar principles as the protection of tangible property.[3] The economic value of intellectual property is projected as a correlation between supply and demand, whereas the basis of the economic evaluation is the scarcity of the resource, or in other words, the (lack of) availability of protected creations or inventions.[4] As such the primary aim of Intellectual property laws is the creation of a situation where the creator or author has under his or her control the physical availability of the work[5] and is able to control and exploit its economic value.[6] For example, the value of a book is in this system generated by the willingness of readers to pay for its physical possession, whereas the supply of physical copies is limited.

It means that the applicable intellectual property laws are primarily based on restrictions. Regardless of whether we speak about copyright, patents or other forms of intellectual property, the law creates an implicit restriction to all forms of use of protected outcomes of creative and/or inventive activity once such an outcome is legally recognised (that might

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[2] See for example the introductory part of Goldstein, P. *Intellectual Property: The Tough New Realities That Could Make or Break Your Business*, London: Penguin Books, 2007.

[3] Despite its terminology, intellectual property still differs in many respects – see Evans, D. E. *Who Owns Ideas? Foreign Affairs*, 2002, vol. 81, p. 160.

[4] See for example Lüder, T. *Next Ten Years in E.U.* Copyright: Making Markets Work, Fordham Intellectual Property, Media and Entertainment Law Journal, 2007-2008, vol. 18, p. 1.

[5] The aspect of absolute control of information has, however, never been present in the structure of intellectual property. This was noted, among others, also by Lawrence Lessig in his book Freeculture: *"We have always treated rights in creative property differently from the rights resident in all other property owners. They have never been the same. And they should never be the same, because, however counterintuitive this may seem, to make them the same would be to fundamentally weaken the opportunity for new creators to create"* – see Lessig, L. *Freeculture*, New York: The Penguin Press, 2004, p. 118.

[6] See Ghosh, S. *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, University of California Davis Law Review, 2006-2007, vol. 40, p. 855.

happen per se like in the copyright law or by a registration like in the case of patents or industrial designs).

In that respect, we need to assume that intellectual property laws should be taken into account with regards to PSI re-use as a purely limiting factor. To put it short, intellectual property, yet forming and important part of PSI re-use legal regulatory framework, cannot do any good to PSI re-use. We will specifically turn to GLAM institutions later on, but the exemption of works covered by third party intellectual property rights might tempt these cash strapped institutions to engage the services of third parties, or should one say third party investors, to assist with their digitisation efforts and to grant them some form of intellectual property right in the outcome. That would effectively bring these works outside the scope the PSI Directive and re-enforce the potential negative impact of intellectual property.

We will see later on though that copyright can, against expectations, play a positive role in relation to public sector works, in combination with a generous and well-developed licensing policy.

1.2 INSTRUMENTS OF INTELLECTUAL PROPERTY THAT AFFECT PSI RE-USE

In recent work under LAPSI and LAPSI 2.0, we examined the following forms of intellectual property and analysed the following general ways in which they affect processing and re-use of public sector information[7]:

- Copyright – the most frequently and the most complicated protective instrument affecting different sorts of PSI. Besides mere scope of copyright protection of PSI in different Member States, there is namely a question of presence and relevance of third party rights in PSI and practical problems with regards to various licensing schemes.
- The sui generis database right – this protection affects the re-use of public sector databases even when they are not regarded as pure copyrighted works (i.e. those that lack per se creative element). Despite being similar in their nature to copyright, the catalogue of practical problematic issues arising from database rights with regards to PSI re-use is slightly different and contains questions

[7] See also Sappa, C. *Selected Intellectual Property Issues and PSI Re-use*, Masaryk University Journal of Law and Technology, 2012, vol. 6(3), p. 445.

of technical parameters of databases (namely formats), their continuous v. repeated availability, integrity rights etc. It is also to be noted that sui generis rights are relatively new compared to copyright or other intellectual property rights, so there is a lack of case-law and established practices even as to the mere question of that actually is protected and to what extent.

We observed that trademarks and other protected indications as well as patents and similar instruments (e.g. utility designs) or industrial designs do not generate any significant practical legal problems in PSI re-use. However, we noted that, in the EU, substantial amount of investment into inventive industries is targeted at producing inventios that were already made and patented before.[8] The original purpose of patent law is to provide for general publicity of useful inventions and to prevent not just their unauthorised use but also waste of similar inventive efforts. In that respect, we have to state that existing methods providing for availability and re-use of information stored in public patent and utility design databases do not provide for sufficient distribution of information as to inventions already made and protected. That issue, however, falls outside of the scope of this recommendation.[9]

1.3 IP V. PSI RE-USE IN THIS POSITION PAPER

By analysing a number of practical forms of PSI re-use, we identified copyright as the most frequent and the most problematic instrument of intellectual property law. Having tackled licensing in other outcomes of this project[10], we decided to focus in this policy recommendation primarily on public works as a phenomenon of copyright law that is specifically important with regards to PSI re-use. In that respect, we tried to comparatively analyse not just formal definitions of public works, but rather to pragmatically examine practices in the application of this concept in actual cases of PSI re-use.

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[8] See Scotchmer, S. *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, The Journal of Economic Perspectives, 1991, Vol. 5(1), No. 1, p. 29.

[9] This problem was noted by the Commission in 1980, but very little was done in that respect despite massive introduction of ICT since then. See Thomsen, E. *Access to patent information and documentation in public patent libraries*, World Patent Information, 1981, vol. 3(3), p. 103.

[10] Sappa, C., Polčák, R., Myška, M., Harašta, J. *Legal Aspects of Public Sector Information: Best Practices in Intellectual Property*, Masaryk University Journal of Law and Technology, 2014, vol. 8(2).

Besides that, we identified specific need to elaborate on copyright limitations that apply in the course of operations of cultural institutions. These institutions physically hold significant amounts of national and European cultural heritage whose re-use, namely through services of information society, is of high public interest. The cultural content itself (let it be books, works of art, archeologic items etc.) is not in many cases protected per se by copyright or any other intellectual property right. However, its processing in order to enable its re-use (namely digitisation) might in typical cases generate copyright concerns that need to be addressed.

Thus, we decided to focus on typical intellectual property law issues arising of PSI processing and re-use by cultural institutions. In addition, we tried to identify and discuss recent specific concerns that arise of copyright and related forms for protection of digitised cultural content.

1.4 CHANGES IN COPYRIGHT PRACTICE THROUGH PSI RE-USE LAWS

In order to get a proper picture of the operational mode of copyright law with regards to PSI re-use, we engaged in the aforementioned comparative study.[11] It led, besides particular findings regarding public works, also to general conclusion as to the existence of a number of small, yet practically important, differences among copyright laws of participating Member States. In result, we had to state that relevant provisions of copyright laws create, from the perspective of the common market, quite a spectacular patchwork consisting of mutually different approaches as to what of PSI is protected and to what extent.

It is obviously not the task of this policy recommendation to address the general problematic issue of missing factual harmonisation of copyright laws of the Member States. On the other hand, we found that it is possible to overcome this problem by appropriate implementation and interpretation of the PSI re-use Directive. In other words, we noted that harmonisation of the PSI re-use Directive in different member states can provide for concerted practice in copyright protection of PSI without a need to amend copyright laws.

[11] Best practices analysis that came out from the comparative study was published as LAPSI 2.0 Best Practices in IP Report and it is available at www.lapsi-project.eu.

1.5 APPROACHING THE ISSUE (METHODOLOGY)

Besides the aforementioned findings, the comparison of actual practice of the application of the copyright concept of public work led us also to the conclusion that the comparative method is a relevant part of the methodological toolbox for this task.[12] In theory there should be no need to compare harmonised jurisdictions, however we noted that such comparison is inevitable in order to examine the actual impact of copyright protection on PSI re-use. This does not mean that there is a reason to doubt the compliance of participating Member States with the requirements of copyright harmonisation Directives, but we did find that when it comes to PSI re-use on the internal market, even prima facie insignificant diverse details in national copyright laws matter.

A second core component of the methodology of this position paper is the pragmatic legal method.[13] The inevitability of its application arises namely from the fact that the respective issues are partly of a technical nature. Especially when it comes to databases or digitisation, legal interpretations need always to be tested against factual technological limitations, recent technical usages or against the nature of objectively existing market mechanisms. In that respect, the pragmatic method offers stable grounds for taking all relevant legal, technical, social and other aspects into proper account.[14] In other words, the pragmatic methodology provides for solutions that are not just theoretically legally arguable but that can actually work in practice.[15]

2. COPYRIGHT EXCEPTIONS FOR PUBLIC SECTOR WORKS

2.1 STATUS QUO ANALYSIS

Despite a relatively high level of overall harmonisation of copyright laws in the Member States, there are a number of particular issues where

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[12] For basics of comparative methodology, see for example Zweigert, K., Kötz, H. *An Introduction to Comparative Law*, transl. Weir, T. Oxford: Oxford University Press, 1998 or Glenn, P. *Legal Traditions of the World*. New York: Oxford University Press, 2004.

[13] Basic of pragmatism are well described in collected lectures of William James who reportedly give pragmatic methodology its name – see James, W. *Pragmatism*. Rockville: ARC Manor, 2008.

[14] On the contrary, positivist or naturalist methodologies always keep certain distance from actual reality – see Samuel, G. *Epistemology and Method in Law*. Hampshire: Ashgate Publishing, 2003, p. 24.

[15] See for example Rorty, R. *The Banality of Pragmatism and the Poetry of Justice*, Southern California Law Review, 1990, Vol. 63, p. 1811.

substantial differences still prevail. One of such cases is the copyright protection of works produced by public institutions in the course of fulfilment of their regular public tasks (public works).

These works represent an important part of the overall scope of the PSI Directive and so it was crucial for the project team to analyse the extent to which copyright law might limit or promote their re-use. Thus, a comparative study was undertaken to find out not just about particular forms in which public sector works are legislated in national copyright laws but also to map factual effects of everyday use of specific protective instruments or exceptions.

The primary goal of the comparative study was to provide for a comparative analysis of actual practices that are based on national copyright instruments that specifically apply to public works. The secondary aim of the study was to determine whether there is any correlation between protective instruments of national copyright laws and the actual ways in which respective types of PSI are being made available for re-use. In particular, the project team focused namely on relations between the scope of copyright exemptions and the scope of availability of PSI for re-use.

As it was noted in D 3.1 of March 2014, the results of this comparative study were quite surprising as the differences among the Members States turned out to be more significant than in other fields of copyright law.

Whereas in the U.K., public works are not specifically exempt from copyright protection, the scope of copyright exemptions differs greatly among other Member States. In some countries, public works are defined very broadly and their exemption from the universal copyright regime is total, while other Member States have their exemptions defined more narrowly, so that they might include only e.g. binding legal instruments (black-letter laws, judicial decisions etc.).

As to the mere scope of the copyright definitions of public works, the project team noted in a number of jurisdictions the lack of representative case-law. In result, it might be difficult to determine particular limits of public works exemptions in cases of borderline PSI namely in countries where the copyright definitions of public works are more narrow. For the same reason, it was also impossible to determine in these cases whether national courts tend to assume the protection or the exemption of respective works in cases where their classification as public works is disputable.

Finally, the project team noted a significant number of jurisdictions that have implemented extensive exceptions of public works, but it is still unclear whether these exemptions apply also to the sui generis database rights. In these cases, exemptions are expressis verbis legis made as to the copyright protection, whereas sui generis protection falls outside of the scope of copyright. Consequently, it will have to be clarified by courts whether public databases are exempt from sui generis protection analogically to the exemption from copyright or whether sui generis protection applies (both options are technically possible).[16]

2.2 SCOPE OF COPYRIGHT EXEMPTIONS AND AVAILABILITY OF PSI

Another surprising finding of the comparative study is related to the relation between the scope of copyright exemptions of public works and their availability for re-use. The project team assumed that countries with broader exemptions of public works from copyright protection would also report a broader scope for and more benevolent schemes of PSI re-use. It was also assumed that the actual practice of PSI re-use in jurisdictions with broader copyright exemptions will be technically simpler due to the fact that there is not need for any extensive licensing schemes or arrangements.

Both of these assumptions turned out to be completely wrong. In particular, the comparative study showed that U.K. with the most restrictive copyright rules (e.g. public works are not exempt from copyright protection[17]) reported a broad variety of PSI available for re-use as well as the existence of highly efficient schemes for their licensing. On the contrary, some countries with broad copyright exemptions of public works reported a number of technical difficulties or administrative obstacles that factually burdened the process of making the PSI available for re-use. Thus, it seems that statutory copyright exemptions of public works matter only insignificantly compared to factual will and ability of administrative bodies to make PSI available for re-use.

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[16] Sui generis rights might be in some respects even stronger means of protection than copyrights. Thus, they deserve specific attention – see Deveci, H. E. *Databases: Sui Generis Stronger Bet than Abstract Copyright?* International Journal of Law and Information Technology, 2004, Vol. 12(2), p. 178.

[17] It is possible to compare this regime not with other Member States, but rather with other common-law countries such as New Zeland – see for example Perry, M. *Acts of Parliament: Privatisation, Promulgation and Crown Copyright – is there a Need for a Royal Royalty?* New Zeland Law Review, 1998, p. 493.

In result, the comparative study led to the conclusion that there is no factual relation between the copyright regime of public works and the factual availability of PSI for re-use. In other words, the copyright exemption of public works neither promotes nor blocks efficient re-use of PSI.

In relation to these findings, the project team made an additional observation as to an alternative factual role of copyright protection of public works in PSI re-use. Rather than as a restrictive measure protecting interests of the copyright holder in commercial exploitation of respective works, copyright protection of public works (where applicable) turned out to be in their effect rather protecting the integrity of PSI.

In jurisdictions where extensive copyright exemptions of public works apply, public institutions find it often legally difficult to protect the integrity of PSI that is being released for re-use. Apart from copyright, there are almost no instruments able to provide for adequate protection of PSI against further alterations or manipulations. In that sense, copyright as a restrictive instrument might in these cases prevent not the reproduction or the publication of respective public works but it might rather provide for causes of actions against unauthorized changes of respective PSI. In result, copyright protection of public sector works might in that sense lead to greater certainty of end users of services based on PSI re-use. The positive effect of copyright in this area is mainly due to the fact that it creates certainty. That certainty is created for the licensor, as well as the licensee. Copyright makes it very clear what the exclusive right is, what are the restrictions and what is the licensee allowed to do. The licensee also gets a very positive authorisation to do certain things, and that is also useful to ascertain its position against third parties and other potential licensees. One needs therefore a generous, clear and detailed licensing policy in combination with the rules of copyright to guarantee the positive result.

2.3 FUTURE OF COPYRIGHT EXEMPTIONS

The first and rather obvious resulting position with regards to copyright exemptions of public works is that their existence or scope are almost completely irrelevant to the successful establishment of efficient schemes of PSI re-use. Thus, there is no reason to believe that an establishment or an enlargement of copyright exemptions of public works in surveyed

jurisdictions would bring any significant improvements as to the fulfillment of the objectives of the PSI Directive.

One of the rather surprising findings of the aforementioned comparative study was also that there is significant diversity among the Member States not just as to their black-letter copyright exemptions, but subsequently also as to practical measures and organizational procedures that result into the establishment of PSI re-use mechanisms. Although that was not the primary focus of the comparative study, it provided for solid grounds as to the impossibility of finding one copyright solution for public works that would fit all of the Member States surveyed. Even if there is a will to include public works exemptions into the count of copyright issues harmonized by European law, there remain serious doubts about the question whether it would be possible to design a regime that could seamlessly fit all Member States' current systems of functioning of public sector bodies.

The project team found that the existence of copyright protection of PSI (i.e. non-existence of copyright exemptions for public works) does not represent per se any burden to PSI re-use. Moreover, there was even a noted positive role of copyright protection of public works in providing for the integrity control over the PSI that is release for re-use. As the concerns about the integrity of PSI often lead to factual hesitation of public sector bodies in making PSI available for re-use, there is a reason to further elaborate on legal mechanisms that would provide for sufficient safeguards in that sense even in jurisdictions where copyright protection of public works does not apply.

3. GLAM INSTITUTIONS

3.1 STATUS QUO ANALYSIS

This part is dedicated to the institutional analysis of legal issues related to the making available of PSI for re-use by GLAM institutions.[18] The project team decided to focus particularly on this kind of public sector bodies due to their importance in the cultural development of the Member States, their enormous potential as to available sources of re-usable content and also due to the fact that they have been included into the scope of the harmonized PSI re-use regime only recently.[19]

[18] For basic overview of practical legal issues, see Wienand, J. P. D., *Museums and International Copyright Owner: Multimedia Problems*, International Legal Practitioner, 1996, Vol. 21, p. 78.

It is to be noted first that there is no universal classification of GLAM institutions across the Member States, what makes any comparative study highly problematic. This is not only caused by the fact that legal definitions of GLAM institutions are often missing in national laws, but also in particular by the significant diversity in forms of their establishment, structure of internal organization, relations to other public sector bodies, sources and models of financing etc.

As to the form of establishment, the project team noted that some GLAM institutions exist and operate relatively independently from states, self-governing units or other public sector bodies, i.e. they have their specific legal existence, autonomous decision-making procedures etc., in combination with limited ways of public control or political influence on their functioning. As to the regime of intellectual property rights, this form of GLAM institutional establishment provides for relatively independent IP attribution. In result, these GLAM institutions decide autonomously about their IP rights and are independently legally liable for being compliant with PSI legal regulatory requirements. Typical examples of this class of GLAM institutions are some public libraries that are established and financed by states or self-governing units, but have an independent form of establishment (mostly as non-profit organizations), and that act as owners of their respective property and holder of respective rights.

Other standard form of establishment of GLAM institutions that the project team noted in the Member states is similarly based on an independent legal personality of the GLAM institution while keeping property and IP rights over cultural content at the founding public sector subject (state, region, municipality or alike). In this model of establishment, GLAM institutions independently (i.e. on their own account and liability) administer property or IP rights over the cultural content, but they neither own the respective cultural content nor hold IP rights. Typical examples include some repositories, archives or galleries that administer, conserve or display collections of highly precious cultural content owned by states or regions.

The third main class of GLAM institutions do not have separate legal existence, i.e. they exist in some form of organizational arrangement within

[19] For past work on cultural institutions and their role in PSI re-use, see Bogataj Jančič, M. Pusser, J. Sappa, C, Torremans, P. *Policy Recommendation as to the Isuue of the Proposed Inclusion of Cultural and Research Institutions in the Scope of PSI Directive*, Masaryk University Journal of Law and Technology, 2012, Vol. 6(3), p. 353.

structures of other public sector bodies. Their establishment and functioning incl. dedication of resources, administration of rights etc. is a matter of organizational decisions of the respective public sector bodies. In practice, they also often share utility services, i.e. accounting, legal assistance, internal audit etc., with the rest of respective public sector bodies. Typical examples include namely institutional archives, repositories, libraries that exist within larger public sector bodies like ministries of interior, armed forces, ministries of culture etc. Another typical examples include public cultural funds and grant agencies whose primary aim is to support cultural production by co-producing works of art, e.g. music, theatre, audio-visual works or literature.

The aforementioned institutional distinction is not just important for the issue of de iure attribution of IP rights or liabilities for compliance with PSI re-use rules. The project team noted that the form of establishment plays an important role also as to the factual functioning of technical, organizational and legal mechanisms of PSI re-use. In particular, GLAM institutions that are entirely independent tend to be in general more active when deciding about releasing their PSI for re-use or developing technically innovative solutions for utilisation of respective cultural content. On the other hand, GLAM institutions that are fully integrated into the structures of larger public sector bodies show faster reaction on contemporary political developments, i.e. if the new political representation of respective Member State or region is proactive in PSI re-use, integrated GLAM institutions tend to adapt faster to such change.

Some GLAM institutions are better placed that others to decide on which material they can make available as PSI for re-use and on their licensing policies. In general smaller institutions often lack resources in this area and these then become reliant on an overall policy designed by their larger parent public institutions. If they are independent they face a real problem. Larger institutions often have the resources to develop these policies independently and any oversight by parent public institutions is then rather a hindrance, as the latter do not face the outside world and the re-use scene in the same way. One also needs to draw attention to the fact that GLAM institutions are still allowed to charge under the Directive. Many of the institutions are cash strapped and this can provide a source of much needed income (i.e. to cover a digitisation policy), but one need to take into account that running such an exercise comes with (significant) overheads, including

staff costs to run the scheme on a daily basis. Smaller institutions and those with less in demand collections may find that the overheads wipe out most or all of the income.

GLAM institutions may also be tempted to seek assistance from third parties in their digitisation efforts. Third parties may bring in technical know-how and technical and financial resources, but they often want exclusivity, or worse, intellectual property rights in the pictures generated (if copyright allows this) and in the metadata generated. The latter could even bring the content outside the scope the Directive.

4. DIGITISATION

4.1 STATUS QUO ANALYSIS

Digitisation represents one of most vibrant topics of contemporary discourse in intellectual property. Advanced technologies enable us to capture and store different forms of creative or inventive works including texts, audio-visual works, 3D objects and even complex cultural situations like historical buildings or archaeological excavation sites.

The possibility to digitally capture past works provides for nothing less than making all sorts of valuable information relatively independent of the tangible substance. While the ways in which information contained in books, paintings or works of architecture can be utilized are limited by the physical availability of respective tangible objects, digital forms of this information enable the emergence of endless possibilities of its reproduction, dissemination and utilization at almost no marginal costs or efforts.[20] Besides that, digitisation can save precious information from damage or destruction that inevitably follows physical damage to its carriers.[21]

Despite the fact that it is possible to oppose the benefits of digitisation by arguing that no reproduction method can adequately replace the original, it remains undisputable that having a digital copy (or picture, 3D model, simulation etc.) is better that having nothing at all. Consequently, the main benefit of digitisation is not to be seen in the fact that it can technically alter

[20] Positive impacts of availability of information represent one of key topics of newly emerging discipline of cultural environmentalism – see Cunningham, R. *The Tragedy of (Ignoring) the Information Semicommons: A Cultural Environmental Perspective,* Akron Intellectual Property Journal, 2010, Vol. 4(1), p.1.

[21] For detailed explanation of various positive effects of digitisation and subsequent availability of cultural content see Madison, M. Frischmann. B. T., Strandburg, K. *Constructing Commons in the Cultural Environment*, Cornell Law Review, 2014, Vol. 95, p. 657.

the conservation or preservation of original works, but that it can provide for entirely new forms of utilization of valuable content that would be under normal circumstances available only to a very limited audience and for very limited forms of re-use.

In that sense, Europe with its unmatched richness of cultural heritage must play a leading role in the digitisation of its creative and inventive content – not primarily for conservation purposes but mainly in order to provide for broader availability of all sorts of useful information for further utilization.[22]

A number of digitisation projects already emerged as a matter of various private and public initiatives. Besides enormous potential for further utilization of digitised content, they also bring concerns as to a number of organizational, technical and legal issues.[23] The project team investigated and discussed some of these concerns and noted their emergence as well as their complex nature.[24] The following analysis tries to outline and briefly describe most emerging problematic issues of re-use of content digitised from sources held by public institutions.

4.2 PHYSICAL ACCESS TO THE ORIGINAL CONTENT

Public institutions around Europe physically hold enormous collections of content that is suitable for digitisation and further re-use. Public cultural institutions like museums, archives or libraries typically preserve repositories that contain cultural content produced by external entities, while public universities, art agencies and similar establishments engage not just in the storage of such content, but also in its original production. Besides that, there are a number of other public bodies that produce or keep enormously rich repositories, not as their primary activity, but besides other public tasks – e.g. the armed forces, ministries, local administrations etc.

In all such cases, public institutions physically hold tangible substance bearing the informational value – let it be books, paintings, objects or anything else. Despite the fact that these objects can be qualified as works of

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[22] It is a bit paradoxical that cultural interests are often presented as contradictory to principles of trade and that such contradiction is also present in sources of international law – see Burri-Nenova, M. *Trade and Culture: Making the WTO Legal Framework Conducive to Cultural Considerations*, Manchester Journal of International Economic Law, 2008, Vol. 5(3), p. 2.

[23] See for example Bollier, D. *Why We Must Talk about the Information Commons*, Law Library Journal, 2004, Vol. 96(2), p. 267.

[24] See Cornish, W. *Conserving Culture and Copyright: A Partial History*, Edinburgh Law Review, 2009, Vol. 8, p. 8.

art, it is often not copyright law that limits their digitisation and re-use, but rather property rights to the respective tangible objects.

One of the leading principles of the legal regulatory framework of PSI re-use is the non-discrimination of re-users.[25] However, all consequent provisions apply to information, so there are no legal measures that would provide for any kind of protection against discrimination when it comes just to physical availability of tangible objects. Even in countries with extremely broad access rights, it is always possible to force public sector bodies to extradite information, but not tangible objects.

Simple enlargement of the scope of non-discriminatory treatment also to culturally relevant physical objects that are being owned (or held) by public sector bodies, however, does not seem to be a viable solution for this problem. One reason is that the scope of such enlargement might bring highly problematic consequences to the everyday operations of public sector bodies - one can imagine for instance endless requests for furniture, paintings or other items used as decorations at the premises of public bodies. Another reason for the rather exclusive or selective basis on which objects should be made physically available for digitisation is that physical manipulation required for digitisation might, despite being done with maximum care, negatively affect the condition of the respective objects. In that sense, it is often desirable to expose tangible objects to digitisation not more frequently than what is absolutely necessary in order to get proper digital images.

In any case, the impossibility of the application of harmonized PSI re-use rules or national PSI access rules makes it inevitable to tackle the issue of physical availability of culturally relevant objects within the scope of national rules regulating the disposal of public property and the conservation of cultural heritage. In that respect, there is a reason to work on specific national rules that would provide for fair access to physical objects for digitisation purposes.

4.3 SCOPE OF PROTECTION OF DIGITISED CONTENT

One of the questions emerging from the above mentioned issue of physical availability of the original objects is related to the possibility of copyright protection of images resulting from the process of their digitisation.

[25] See for example Leith, P. McCullagh, K. *Developing European Legal Information Markets based on Government Information*, International Journal of Law and Information Technology, 2004, Vol. 12, p. 247.

Although there might be already no copyright limitations applicable to the originals, e.g. to old books, works of art, movies, 3D objects etc., it is possible in some jurisdictions to apply copyright protection to their digital images. This does not only relate to situations when digitisation includes substantial creative input in the sense of creative digital restoration or improvement of the original content (e.g. in the case of motion pictures or 3D modeling of archaeological excavation sites), but in some cases also to scans of books, photographs or paintings.

The possibility of copyright protection of digital images might then provide for an emergence of subsequent copyright protection of old cultural heritage that itself is not protected by copyright.[26] In a situation when the original works are being made available for digitisation by public institutions and there is an inevitable need for some level of exclusivity as to the access (see above), it might result into the paradoxical situation in which digitisation of public domain objects made available by public institutions might establish entirely new forms of copyright exclusivity.

In order to tackle this issue, there is, first, a need to analyse to what extent the copyright protection might apply in particular jurisdictions to digital images of different sorts of objects.[27] Secondly, there is a need to identify the consequent risks as to the resulting copyright exclusivity and to develop best practices or to eventually lay down specific binding rules for public sector bodies in relation to agreements upon which the original objects are made available for digitisation.

4.4 EXCLUSIVITY AND SUBSTANTIAL INVESTMENT IN DIGITISATION

It was mentioned supra IV.2 that when it comes to digitisation, certain forms of exclusivity might be actually appropriate or even inevitable. In particular, it would be difficult to avoid the exclusivity as to physical access to the original content.

Apart from that, there is also a reason to consider in particular cases the admissibility of ex post legal or factual exclusivity to the digitised content itself. The process of digitisation often requires the use of special

[26] See for example Alterwain, A. *Google Books and Digitisation of Libraries: Fair Use or Extension of Copyright?* Convergence, 2007, Vol. 3(2), p. 139.

[27] Even in cases when copyright does not apply on digitised works, there might still be possible to apply sui generis protection of databases – see Colston, C. *Challenges to Information Abstract Retrieval – a Global Solution?* International Journal of Law and Technology, 2012, Vol. 10(3), p. 294.

equipment and it might also involve substantial investment as to time of highly skilled professionals.

In some Member States, resources for digitisation can be provided from public funds[28], while in other cases, there are no funds immediately available to cover this task. For the latter case, there is a need to establish commercial incentives that would stimulate the availability of private funding of digitisation projects.

The current solution in Art. 11(2a) of the Directive (the so-called Google clause) provides for a general exemption of digitisation agreements from the ban on exclusive arrangements for PSI re-use for up to of 10 years (with a possibility of, theoretically, endless extensions).

It is then disputable whether such general exemption truly serves the purpose of an extraordinary commercial incentive. In particular, it is questionable whether the exemption of these exclusive agreements should not be limited only to cases when public resources are not used or cannot be used.

4.5 PHYSICAL ACCESS TO THE DIGITISED CONTENT

Apart from the aforementioned legal restrictions, digitised content might be restricted as to the possibilities of further re-use also technically, in particular by proprietary file-formats and DRM. Apart from consumer lock-in, both measures lead to a significant decline in the possibilities as to the re-use of such content.[29]

When digitisation of public content (or content stored by public sector bodies) is done by private entities, public sector bodies might restrict the use of proprietary file-formats and/or DRM by contractual clauses. There are, however, no mandatory provisions in the applicable laws of the Member States that would oblige the responsible public sector bodies to restrict the use of these technical restrictive means in the process of digitisation. This can provide for an opportunity for public sector bodies to legally establish de facto exclusive re-use schemes by making it possible for private bodies to digitise respective content without any restrictions as to the file formats, DRM or other technical features.

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[28] See for example Orssich, I. *State Aid for Films and Other Audiovisual Works - Current Affairs and New Developments*, European State Aid Law Quarterly, 2012, Vol. 1, p. 49.

[29] For critical comparative analysis of the role of DRM see for example Wheatley, C. T. *Overreaching Technological Means for Protection of Copyright: Identifying the Limits of Copyright in Works in Digital Form in the United States and the United Kingdom*. Washington University Global Studies Law Review, 2007, Vol. 7, p. 353.

In addition, DRMs are legally protected per se relatively independently on copyrighted works and the scope of such protection differs among the Member States. While in most countries, DRM might technically protect only copyrights, there are some jurisdictions where DRM might actually protect works (i.e. they might technically limit the use of a work in any way regardless of whether such a form of use is protected by copyright). It is then possible to get subsequent exclusive legal protection even for a non-copyrightable work by technically protecting such work by DRM, because a removal of DRM is illegal per se.

4.6 INSTITUTIONAL DIVERSITY

The aforementioned analysis and discussion of problematic issues in digitisation and re-use of digitised content applies namely to public sector bodies acting as cultural institutions. However, there is a substantial amount of content held also by public sector bodies whose primary role is different from preserving or promoting cultural production. Ministries, supreme state offices, administrative councils or even local administrative bodies often have rich archives and repositories that contain extremely valuable content whose digitisation and consequent availability is more than desirable.

In that respect, the role of official public archives is also specific. They are in a number of jurisdictions used for state-backed permanent storage of official documents and their legal classification is not entirely clear. Some jurisdictions treat them as cultural institutions, while elsewhere they are regarded rather as administrative bodies. Apart from their high overall relevance, they play a very special role in post-communist Member States. These specialized official archives provide for the preservation of modern historical heritage that is related to the post-war establishment of authoritarian regimes and their digitisation always represents a great commitment to the overall development of political culture.

In that respect, there is a need to distinguish between cultural institutions and other public sector bodies namely as to their position in the structure of the state administration as well as to their internal organization. Regularly, cultural organizations are relatively independent of administrative bodies and their connection to the rest of the public sector is mainly related to their financing. This is typical for museums, galleries, libraries, etc. Non-cultural public sector bodies are, contrary to that, often

directly linked with hierarchic structures of the state administration or the local administration and that means that they are not entirely independent in their everyday operations.

In result, the establishment of best practices as to digitisation and consequent re-use of digitised content might represent a different task for cultural institutions and other public sector bodies. While administrative bodies can implement proper policies based on informal internal organizational rules adopted by senior institutions (e.g. on the level of national governments), independently acting cultural institutions need to be motivated (forced) to implement proper best practices mainly by formalized laws or bylaws.

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